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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

October Term, 1955.

No. 670

HERBERT C. McVAY,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA *ex rel.* MARION C. McVAY,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable Earl Warren, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Petitioner Herbert C. McVay respectfully petitions this Honorable Court for a writ of certiorari to review the judgment of the Supreme Court of the Commonwealth of Pennsylvania, affirming the order of the County Court of the County of Allegheny, State of Pennsylvania, denying petitioner's motion to terminate a support order made by the latter court.

Statement of Jurisdiction.

1. The opinion of the Supreme Court of the Commonwealth of Pennsylvania, announcing the judgment of which review is here sought, is reported at 383 Pa. 70, 118 A. 2d 144.

2. The judgment sought to be reviewed is dated November 14, 1955, and was entered on that date.

3. The jurisdiction of this Honorable Court to review the judgment below is believed to be conferred by the provisions of Section 1257, subdivision 3, of Title 28, *U. S. Code.*

Question Presented.

Did the Pennsylvania Supreme Court improperly deny full faith and credit to a final decree of divorce secured by petitioner in a court of competent jurisdiction in the State of Nevada, by holding that a finding of lack of jurisdiction in the Nevada court was sustained by one fact only, namely, that petitioner, in establishing a Nevada domicil, was motivated by a desire to obtain a divorce, when the uncontradicted evidence, and in fact the only evidence in the record below relating to the issue of domicil, established that petitioner maintained a Nevada residence for approximately one year, nine months after the decree of the Nevada court was entered; established his home in Nevada with his present wife; obtained employment there; made extensive purchases of furniture for his home there; established bank accounts, fraternal and religious affiliations, and subscribed to utility and other services in Nevada; never returned to Pennsylvania, and eventually departed from Nevada to go to California only after his employment was terminated through no fault of his, and extensive subsequent efforts to obtain permanent employment in Nevada had proved unproductive?

Constitutional Provision Involved.

"Full Faith and Credit shall be given in each State to the Public Acts, Records and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

United States Constitution, Article IV, Section 1.

Statement of the Case.

1. Petitioner and relatrix were married and lived together in Pittsburgh, Pennsylvania, for many years prior to January 4, 1946. On that date, relatrix secured, in the County Court of Allegheny County, Pennsylvania, an order directing payment to her by petitioner of the sum of $100.00 per month for her support. [16-18][1] This order was modified on July 29, 1947, to provide for support payments of $80.00 per month. [23-24]

2. On January 16, 1949, petitioner departed from Pittsburgh, proceeding directly to Las Vegas, Nevada, with the intention of establishing that State as his permanent home. [47] Since that date, he has never returned to Pennsylvania, nor did he at any time intend to do so. [49]

3. Admittedly, petitioner was motivated in his choice of a domicil by his desire to secure a divorce. [66] His intention to move to Nevada had been formed in November, 1948. [78] After he first began to consider moving to Nevada, he made numerous inquiries to satisfy himself of the possibilities of obtaining permanent employment in or about Las Vegas, before he actually determined to move. [78-79]

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[1]This and all succeeding numbered references are to the page numbers of the certified record below.

4. Petitioner, travelling by train, arrived in Las Vegas on January 18, 1949, securing living quarters in a private home there, at a rental of $12.50 per week. [79] Shortly after his arrival, petitioner secured work as a relief clerk at the Boulder Dam Hotel, about 30 miles from Las Vegas. [55] He held that position until he was able shortly thereafter to secure employment in the type of work in which he had engaged for most of his adult life, as auditor for the Nevada-Biltmore Hotel in Las Vegas, at a salary of $350.00 per month. [55]

5. On March 5, 1949, his residence period required by Nevada law having been completed, petitioner filed his action for divorce against relatrix in the District Court of Clark County, Nevada. [153-155] Service was effected by publication and by personal delivery of a copy of the summons and complaint to relatrix in Pennsylvania. [155-156] Relatrix made no appearance in the Nevada proceedings, and on April 18, 1949, the Nevada Court awarded petitioner a decree of divorce. [157-158]

6. On April 23, 1949, petitioner and his present wife were married in Las Vegas. [36] From the date of their marriage until September 12, 1949, petitioner and his wife continued to reside in Las Vegas at the living quarters originally engaged by petitioner on his arrival. [80] On the latter date, petitioner and his wife moved into an unfurnished apartment located in Las Vegas, for which they paid a monthly rental of $90.00 per month, in which they resided for four months, until their subsequent removal to California. [85-89] The apartment was furnished by petitioner and his wife with furniture purchased by them from several Las Vegas stores, and delivered to and used by them in Las Vegas, at a total cost of $1,264.35. [101-102, 186-191] The last of these pur-

chases, of electrical appliances costing $110.40, was made on December 21, 1949, less than three weeks prior to petitioner's departure for California. [192]

7. Petitioner lost his position with the Nevada Biltmore Hotel on July 15, 1955. [180] He remained in Las Vegas, making extensive and continuous efforts to secure new employment [96-97], contacting prospective employers in and about Las Vegas virtually every day for two months. [97] After two months of effort, petitioner secured a position as auditor at Judd's Furniture Store in Las Vegas, at a salary of $85.00 per week, subsequently increased to $90.00 per week. [95-96, 181-182] Concurrently with his securing this new position, petitioner and his wife moved into their own apartment, to which reference was hereinabove made, furnishing it in the manner indicated.

8. During the one year that petitioner resided in Las Vegas, he regularly attended meetings of the local chapter of the Masonic Lodge, of which he was a member, and regularly attended the church of his faith in Las Vegas. [72-73] He opened and maintained a checking account at the Bank of Nevada in Las Vegas [63], obtained a Nevada driver's license [90-91, 175], and subscribed and made security deposits for utility service, including light and power, and telephone service for a telephone registered and listed in the Las Vegas directory in his name. [98-100, 183-185]

9. Petitioner's employment by Judd's Furniture Store was terminated by his employer on December 3, 1949. [96] He thereupon set out to contact public accounting firms, hotels, utility companies and various business firms, seeking new employment in his field of competency as an auditor or accountant. [96-98] These intensive efforts con-

tinued for more than a month, during all of which time petitioner assiduously sought new and permanent employment which would have permitted him to retain his Nevada domicil. Finally, petitioner having found all of his efforts in this regard to have been unsuccessful, he determined that employment opportunities were probably far greater in California, and in January, 1950, he decided to move to California. [98][2] Accordingly, on January 11, 1950, petitioner and his present wife departed for California. [104] On that date also, they shipped all of their household furniture and possessions by van from Las Vegas to Glendale, California. [104] From that date until the present time, they have continued to reside in California.

10. The permanence of petitioner's nexus to Nevada during the year of his domicil there may perhaps best be judged by a comparison of his living conditions and personal activities there with the startlingly similar conditions and activities maintained by him in Pennsylvania, where the court below held he was actually domiciled during the entire period in which he resided in Nevada, and in California, where he has indisputably been domiciled since January, 1950.

After the separation of petitioner and relatrix in October, 1945, petitioner had very few, if any, family ties or contacts in Pennsylvania. He and wife had no chil-

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[2]Petitioner's uncontradicted testimony that this intention to go to California was not formed at any earlier date is underscored by the equally uncontradicted, documentary evidence that *on December 21, 1949,* he purchased electrical appliances for his Las Vegas home at a cost of $110.40. [192]

dren then living and, for all practical purposes after their separation, petitioner had no wife. For approximately eighteen months prior to his departure from Pennsylvania for Nevada, petitioner rented a single room in the home of his sister in Pittsburgh. He had no telephone or other utility service there. [62] He maintained no bank account in Pennsylvania. [63] He belonged to the Masonic Order in Pittsburgh, as he did in Las Vegas. [72] For eighteen months prior to his departure, he was employed by Hospital Services Association of Pennsylvania as an accountant, at a starting salary of $325.00 per month, which was later increased to $350.00 per month,[3] the latter amount being equal only to the lowest salary he received during his employment in Nevada. [58] Petitioner owned no real estate, personal property or other possessions in Pennsylvania prior to his departure therefrom. His only relatives presently in that State are two sisters. [72]

Petitioner and his present wife arrived in California on January 12, 1950, where they resided, first with relatives for a month and then in a small apartment in Glendale, California, while petitioner sought employment. [59] In June, 1950, petitioner finally secured employment in Bakersfield, California, at a salary of $350.00 per month,

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[3]The court below appeared to find considerable significance in a comparison of petitioner's Nevada earnings and what the court stated was his salary "before going to Nevada" of $415.00 per month. [232] That statement is in error. The salary quoted by the court below was one earned by petitioner in Pennsylvania employment which terminated November 1, 1946. [38, 58] Since that date, petitioner *never* earned more than *$350.00* per month until he moved to Nevada.

again equal to his lowest Nevada salary, and he and his present wife moved to Bakersfield while he was so employed. [53-55, 59] In December, 1950, petitioner terminated his Bakersfield employment and he and his wife returned to Los Angeles. On January 9, 1951, petitioner obtained Los Angeles employment and has worked continuously in that position since that date. [53] Petitioner and his wife rented an unfurnished apartment in Los Angeles in December, 1950, on a month-to-month basis, and are still residing there. [35, 58-59, 74]

11. Petitioner duly and regularly made all support payments required to be made under the Pennsylvania support order until April 18, 1949, the date of entry of the Nevada decree.[4] He made no payments to relatrix after that date. On April 14, 1953, relatrix filed in the County Court of Allegheny County her petition to reduce to judgment the alleged arrearages accruing from April 18, 1949 to February 28, 1953. On that date, no prior service of the petition or other notice upon petitioner having been made, the County Court entered an *ex parte* order so reducing the alleged arrearages to judgment. [27-29] Petitioner having been notified thereof by mail [30], he thereupon served and filed in the County Court a Petition to Open and Vacate the judgment and to terminate the support order. [9-12]

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[4]Under Pennsylvania law, a valid foreign decree of divorce terminates all obligation and future liability under an existing Pennsylvania support order. [*Commonwealth v. Elliott*, 157 Pa. Super. 619, 43 A. 2d 630; *Com. ex rel. McCormack v. McCormack*, 164 Pa. Super. 553, 67 A. 2d 603.]

In that Petition, petitioner timely raised in the court of first instance the federal constitutional question here sought to be reviewed by alleging the fact that he had, prior to the institution of the Nevada proceedings, become a Nevada domiciliary, that he had thereafter instituted in Nevada his action for divorce, resulting in the entry of a decree of divorce in his favor, and praying for the termination of the support order as of the date of entry of the Nevada decree, on the ground that the support order had been then superseded by a valid final decree of divorce. [10-11] Relatrix answered the Petition, denying the allegations of the validity of the Nevada decree. [14-15] Issue being joined as to the validity of the Nevada decree, the matter was heard by the County Court, the sole evidence upon that issue being the testimony of petitioner, taken by way of deposition in California. [33-108, 119-193] Relatrix offered no testimony or documentary evidence in support of her collateral attack upon the validity of the Nevada decree.

The County Court, upon the deposition testimony of petitioner, found that the Nevada court lacked jurisdiction because petitioner was not domiciled in Nevada, and that the Nevada decree was therefore not entitled to full faith and credit in the Pennsylvania courts. [112-115] The petition was denied on that ground. [118] Petitioner thereupon appealed to the Pennsylvania Superior Court, Pittsburgh District, from the order of denial, urging that the order, made upon findings of non-domicil unsupported by evidence, improperly denied to the Nevada decree the

full faith and credit required to be given it by the United States Constitution. The Superior Court noted petitioner's contention [220], but declared that the Nevada decree was not entitled to full faith and credit because of lack of jurisdiction in the Nevada court. [222-227]

Upon application of petitioner, the Supreme Court of Pennsylvania allowed an appeal from the order of the Superior Court, in which petitioner specifically urged as error the refusal of the lower courts to accord full faith and credit to the Nevada decree. [198] The order was thereafter affirmed, the Supreme Court stating that, if the Nevada decree were entitled to full faith and credit, the contention of petitioner would have to be sustained [231], but ruling that the finding of non-domicil of petitioner in Nevada was sustained by his admitted motivation in seeking a divorce, requiring the Pennsylvania courts to refuse to recognize the Nevada decree. [233]

It is to review this determination and judgment that petitioner now petitions this Honorable Court to issue a writ of certiorari.

ARGUMENT.

I.

The Judgment Below, Resting Upon a Finding of Lack of Jurisdiction in the Nevada Court Which in Turn Is Without Support in the Undisputed Evidence, Effectively Denies Petitioner the Benefits of the Nevada Decree to Which He Is Constitutionally Entitled Under the Full Faith and Credit Clause. To Review Such a Judgment, the Certiorari Jurisdiction of This Court Is Properly Invoked.

We are not unmindful of the stringent considerations normally required for the exercise of the discretion of this Court in granting review on writ of certiorari. We believe, however, that these considerations are demonstrably present in the case at bar; in that the Pennsylvania Supreme Court has decided a federal question of substance, namely, the faith and credit required to be given the Nevada decree upon which petitioner relies, in a way probably not in accord with the applicable decisions of this Court. [U. S. S. C. Revised Rules (1954), Rule 19(a).]

In the first of the *Williams* cases, this Court granted certiorari and reversed judgments of the North Carolina court convicting petitioners of bigamy, on the ground that petitioners' constitutional rights had been violated by the failure of the lower court to accord full faith and credit to Nevada decrees of divorce secured by petitioners prior to their allegedly bigamous marriage. [*Williams v. North Carolina*, 317 U. S. 287, 302-303.] The position of petitioner here differs from that of petitioners in the first

Williams case only in this one significant respect: while the court below recognized a duty to accord full faith and credit to the Nevada decree if jurisdictionally valid, it nonetheless declared that no such duty existed in the case at bar because the Nevada court was without jurisdiction to enter the decree in question.

If it is viewed without reference to the record upon which it must have been made, the decision of the court below states correctly an established legal principle. Of course, a court of one State may always inquire into the jurisdictional foundation of the judgment of a sister State and, if it finds such foundation lacking, it may constitutionally decline to recognize that judgment. [*Williams v. North Carolina,* 325 U. S. 226.] But the statement of that proposition merely poses, it does not answer, the question at issue here. Although non-recognition may be based upon a finding of lack of jurisdiction, that finding must in turn rest upon substantial evidence to support it, else the mandate of the full faith and credit clause has not been obeyed. If the State court has rested its refusal to recognize the judgment of a sister State upon a purported finding of lack of jurisdiction that is wholly without factual support, then the State court has acted in a constitutionally prohibited fashion just as surely as did the North Carolina courts by their more candidly stated rule of absolute non-recognition in the first *Williams* case. Such an unconstitutional denial of the rights of petitioner, we submit, has here occurred.

The remedy for such a denial of constitutional rights lies in review by this Court. Where, as here, a "finding of fact" is made in such a manner as to justify a failure to comply with the provisions of the Federal Constitution, the presence or absence of evidentiary support for such

finding is a proper subject of scrutiny by this Court upon writ of certiorari,[5] not to retry the facts, but to insure that under the guise of factual findings constitutional rights are not invaded. [*Rice v. Rice,* 336 U. S. 674, 675; *Williams v. North Carolina,* 325 U. S. 226, 233, 236.]

The principles governing the scrutiny by this Court of such a "finding of fact" have been clearly stated:

> "The challenged judgment must, however, satisfy our scrutiny that the reciprocal duty of respect owed by the States to one another's adjudications has been fairly discharged, and has not been invaded under the guise of finding an absence of domicil and therefore a want of power in the court rendering the judgment. . . .
>
> "State courts cannot avoid review by this Court of their disposition of a constitutional claim by casting it in the form of an unreviewable finding of fact."
>
> *Williams v. North Carolina, supra,* 325 U. S. at 233, 236.

Such scrutiny of the record in the case at bar does not require evaluation of conflicting testimony or considera-

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[5]In *Rice v. Rice,* 336 U. S. 674, 675, this Court granted certiorari to review a Connecticut judgment based upon a finding of fact that a Nevada court lacked jurisdication to enter a decree of divorce there in issue, "to consider petitioner's contention that the Connecticut courts did not fairly discharge the duty of respect owed the Nevada decree under this Court's decisions" in the *Williams* and *Esenwein* cases. The judgment was affirmed upon this Court's subsequent determination that the findings of the Connecticut courts were supported by substantial evidence. [336 U. S. at 675-676.] In the *Esenwein* and second *Williams* cases, judgments of non-recognition were expressly affirmed by this Court only because the findings of lack of jurisdiction were amply supported by evidence. Where, as here, no such evidentiary support exists, the vindication of petitioner's constitutional rights is properly sought in this Court. [See, *Norris v. Alabama,* 294 U. S. 587, 589-590.]

tion of the fact-trier's observation of the credibility, manner of testifying, or demeanor of witnesses. There was concededly no conflict in the evidence below, nor was the trial court afforded any opportunity to guide its determination by its observation of a single live witness. The only evidence introduced in the cause below and upon which the challenged Pennsylvania judgment had to be premised was the testimony of petitioner, *by deposition taken in California,* and the documentary evidence offered by petitioner in the course of his deposition. No other evidence, oral or written, was offered or considered.

In making a determination of lack of jurisdiction, then, the court below was not expressing a choice among conflicting or divergent versions of the facts, but was expressing only a legal conclusion as to the effect upon the validity of the Nevada decree of an undisputed and unquestioned set of facts. Such a conclusion from undisputed facts and documentary evidence is properly subjected to re-examination by this Court.[6] [*United States v. United States Gypsum Co.,* 333 U. S. 364, 394-395.]

The refusal of the Pennsylvania courts to recognize petitioner's Nevada decree must rest upon evidence supporting that refusal. The only evidence claimed to support the rulings below is the undisputed, written and documentary evidence considered below. Where, as here, that

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[6]The Pennsylvania law similarly denies appellate finality to conclusions from undisputed facts and documents. [*Poelcher v. Poelcher,* 366 Pa. 3, 5, 75 A. 2d 656; *Wallace v. Wallace,* 371 Pa. 404, 407-408, 89 A. 2d 769.]

evidence demonstrably fails to sustain the conclusion engrafted upon it, the resultant denial of petitioner's constitutional rights requires review by this Court.[7]

II.

Where, As in the Present Case, the Judgment of the Nevada Court Rests Not Only Upon a Presumption of Validity, But Also Upon an Uncontradicted Showing of Petitioner's Nevada Domicile, Non-Recognition of the Decree Cannot Be Premised Upon Assessment of the Character of the Motives With Which Such Domicile Was Acquired.

The duty of respect owed by the courts of a State to the judgment of a sister State, imposed by Article IV, section 1 of the Federal Constitution, commands that such judgment be recognized and enforced, in the absence of clear and convincing evidence that the court in which the judgment was entered lacked jurisdiction to enter it. The authenticated record of the proceedings in the sister State imports a strong presumption of jurisdictional validity to the judgment entered therein. "If it appears on its face to be a record of a court of general jurisdiction, such jurisdiction over the cause and the parties is to be pre-

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[7]As the court below stated [231], a valid Nevada divorce decree would nullify the Pennsylvania support order and necessitate judgment for petitioner, under Pennsylvania law. The application of this local law, then, required the court below to determine, as it did determine, the constitutional question of the faith and credit which must be given the Nevada decree. Where the application of a rule of local law requires the prior resolution of a substantial federal question, the State court's resolution of that question is properly made the subject of scrutiny by this Court. [*Sutton v. Leib*, 342 U. S. 402, 407; *Esenwein v. Pennsylvania*, 325 U. S. 279.]

sumed unless disproved by extrinsic evidence, or by the record itself." [*Adam v. Saenger,* 303 U. S. 59, 62; *Cook v. Cook,* 342 U. S. 126, 128; *Titus v. Wallick,* 306 U. S. 282, 287.] Unless the presumption arising from that record is affirmatively overcome by clear and positive evidence, the Constitution commands that the judgment be recognized. The burden of proving a lack of jurisdiction rests heavily upon the assailant of the judgment. The Constitution requires that the judgment be recognized unless that heavy burden is fairly met. [*Williams v. North Carolina,* 325 U. S. 226, 233-234.]

These principles are particularly significant in their application to the case at bar. The duly authenticated record of the Nevada proceedings, including the decree of divorce secured by petitioner, was placed in evidence below. [153-160] Upon that record, a strong presumption of jurisdiction in the Nevada court arose, a presumption which respondent could have overcome only by a positive and convincing showing to the contrary. [*Adam v. Saenger, supra; Williams v. North Carolina, supra.*] The only extrinsic evidence offered on the question of jurisdiction, however, was the deposition testimony and documentary evidence of *petitioner.* Far from meeting respondent's burden of proving petitioner's non-domicil in Nevada, that testimony established conclusively and beyond dispute, apart from the presumption of validity attaching to the judgment, that petitioner had acquired a bona fide Nevada domicil clearly sufficient to sustain the jurisdiction of the Nevada court.

It thus appears, from facts as to which the Court below recognized that no dispute exists [231], that petitioner left Pennsylvania in January, 1949 with the intention of removing his residence permanently from that

State, with no intention to return, and with the specific intention of establishing his home in Nevada. He has in fact never returned to Pennsylvania. It is readily and indisputably apparent that he abandoned his Pennsylvania domicil when he left with the intention not to return. Granting this to be true, the court below, in order to sustain the judgment, has placed petitioner in the ambivalent position of having had for an entire year a domicil in a State from which at the beginning of that year, he had concededly departed with no intention of ever returning, to which State he has in fact never returned, and to which State during the period in question he had no ties or connections of even the most tenuous nature!

Nothing in the testimony of petitioner supports, by inference or otherwise, so extraordinary a conclusion. Petitioner testified that he departed for Nevada with the intention of securing employment and establishing a permanent home there, that he subsequently established himself in Nevada with the intention of remaining there, and that it was not until almost a year later, when it became apparent that opportunities for continuing Nevada employment were inadequate, that he changed his intention and removed to California.

That the conceded abandonment by petitioner of his Pennsylvania domicil, coupled with his removal to Nevada with the intention of remaining there, resulted in the establishment of a bona fide Nevada domicile does not rest in doubt. As recently stated in reference to the concurrence of these undisputed facts by the Court of Appeals for the Third Circuit: ". . . if an individual has abandoned his domicile by departing from his home there with the intention not to return to it as a home he acquires a new domicil at the moment he arrives at another place

in which he then and there intends to make his home for an indefinite time in the future." [*Berger v. Berger*, 3 Cir., 210 F. 2d 403, 405.]

The objective manifestations of petitioner's intent are equally consistent only with the presumption that he was domiciled in Nevada, and are wholly inconsistent with the contrary conclusion. [Statement of the Case, 6-9, *supra.*] Whatever deficiency petitioner's activities may have exhibited, when compared with some hypothetical ideal of domicil against which the courts below appear to have measured his claim, are attributable to the inadequacy of petitioner's financial and occupational resources, and not to any absence of intent to make his home in Nevada. The comments made by the Pennsylvania Supreme Court concerning the claimed insufficiency of petitioner's Nevada domicil are to the same extent applicable and persuasive of an argument that petitioner never acquired a domicil, either in Pennsylvania where he was admittedly domiciled until January, 1949, or in California where he has been domiciled since January, 1950: (1) the employment secured by petitioner in Nevada was employment at his lifelong occupation, previously pursued in Pennsylvania and subsequently pursued in California, at salaries in excess of both his last salary in Pennsylvania and his first in California; (2) his fraternal and religious affiliations and activities, bank accounts, property acquisitions and community activities were, at the least, as numerous, varied and active as they were in Pennsylvania or are in California; (3) his marital residence in Nevada, which he acquired as soon as his earnings would permit and maintained until all hope of obtaining continuing employment in Las Vegas had evaporated, was of a far more permanent and substantial character than were either his previ-

ous residence in Pennsylvania or his first three residences in California.

To hold petitioner to a higher standard of permanence of domicil, as the court below has done, is to exact of him, as a condition of the preservation of his constitutional rights, compliance with requirements which his financial resources and occupational status render wholly unattainable. The absurdity of these standards as they govern the case at bar is graphically demonstrated: to apply standards of domicil set up by the court below to petitioner's residences in Pennsylvania prior to 1949 and in California since 1950 would compel the conclusion that petitioner *was never domiciled in either of these States.* Compliance with the full faith and credit clause is not effected by applying it against so unrealistic a test of jurisdiction.

The judgment below is not aided by the suggestion that, even in the absence of factual basis for doubting its credibility, the courts of Pennsylvania may have chosen not to believe petitioner's testimony. If petitioner is not believed, then the result is simply that there is *no credible evidence* in the record as to petitioner's domicil or nondomicil. A refusal to believe petitioner cannot sustain the judgment below, since it was not petitioner's obligation to prove his domicil. The burden was, as this Court has repeatedly stated, upon respondent to prove that he was not so domiciled and the resultant absence of *any* evidence, if petitioner's testimony is not believed, required a judgment in accordance with the presumption of validity —in favor of petitioner. ". . . a belief that testimony is false will not support an affirmative finding that the reverse of that testimony is true." [*Eckenrode v. Pennsylvania R. Co.*, 3 Cir., 164 F. 2d 996, 999, *aff'd* 335 U. S. 329, 330, *and cases cited.*]

Nor can the judgment be sustained on the theory that the undisputed evidence is susceptible not only of the inference that petitioner intended to and did establish a Nevada domicil, but also of the contrary inference that all of petitioner's Nevada activities were no more than a clever facade designed to conceal his "real" intention to pretend to acquire a Nevada domicil only to give apparent validity to the Nevada decree. [233] *At the very most,* the record furnishes equal support for these two conflicting inferences. There is not even a scintilla of evidence upon which the court below could have based a reasoned preference for the latter inference over the former. The situation thus presented is governed by a rule of law well established in the decisions of this Court:

> "We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover." [*Pennsylvania R. Co. v. Chamberlain,* 288 U. S. 333, 339-40 *and cases cited;* See also, *Wallar v. So. Pacific Co.,* N. D. Cal., 37 Fed. Supp. 475, 481.]

Here it is not petitioner, but respondent, upon whom rests the burden of affirmative proof. Respondent does not meet that burden by the fact, if it be a fact, that petitioner's evidence does not prove the existence of a Nevada domicil to the complete exclusion of the hypothesis that it may all have been just a clever fraud. Where, as here, the evidence viewed from respondent's standpoint concededly proves nothing more than that, the presumption of validity of the Nevada court's assumption of juris-

diction has not been disspelled, and the Nevada decree must constitutionally be given effect.

Reliance in adopting the alternative inference, that petitioner only pretended to acquire a Nevada domicil but did not actually do so, has been placed by the court below upon one simple fact: petitioner's admitted primary reason for selecting the State of Nevada as his new domicil was his desire to secure a divorce. [66] But the emphasis placed upon petitioner's candid admission to this effect wholly confuses the intent necessary to establish a domicil with the social acceptability of the motives which may have caused the formation of that intent. In determining whether petitioner had acquired a new domicil in Nevada, the motives which actuated his choice are of no legal consequence.

Ours is a highly mobile population. The history of this nation has been largely one of the movements of its people. These movements have been influenced by many motives, both commendable and reprehensible. Nevertheless, these movements have indisputably resulted in permanent changes of domicil, nonetheless effective because of the high or low character of the motives influencing them. In recent years, the impelling factors behind specific changes of domicil have often been of a more sophisticated character. Our States are in active competition with each other to acquire new residents, residents who must necessarily have reasons to change domicil. Various attractions to influence such changes are held forth as inducements: lower or no State taxes; inexpensive land, power or labor; liberal divorce laws; better or more even climate; minimal regulation of or interference with business and industry. A change of domicil may be influenced by any number of these or of a multitude of other motives. The

effectiveness of such a change, particularly where the faith and credit to be given a sister State judgment is involved, cannot be made to depend upon the view which the courts of another State take of the moral value of the motive which impelled the change.

It follows, then, that if the acts and intentions of petitioner were, as a matter of law, sufficient to result in the acquisition of a Nevada domicil, the Nevada decree is not deprived of its binding effect because petitioner moved to Nevada in order to obtain it. Conversely, had petitioner failed to meet the requirements for the acquisition of such a domicil, the most indisputably laudatory motives would not have aided his cause. Since the motives which actuated petitioner's conduct could have had no effect upon the validity of the Nevada decree, those motives cannot constitutionally be relied upon by Pennsylvania to permit its courts to evade the duty of respect owed by them to that decree.

Although this Court has not heretofore passed upon the precise question here at issue, the State courts which have considered the question have unanimously held that, under the full faith and credit clause, a valid domicil for purposes of divorce may be acquired even though the purpose of its acquisition was to obtain such a divorce. Accordingly, it is held, the courts of one State are not at liberty to decline recognition of a divorce decree of a sister State, when non-recognition is premised upon a finding that the particular State was chosen as a domicil, in part at least, because of the liberality of its divorce laws. [*McFarland v. McFarland,* 179 Va. 418, 19 S. E. 2d 77, 81-82; *Peff v. Peff,* 2 N. J. 513, 67 A. 2d 161, 164; *Wicker v. Wicker* (Ark.), 269 S. W. 2d 311, 312; *Hammond v. Hammond,* 278 P. 2d 387; *Lanigan v. Lanigan,*

78 So. 2d 92; *Brown v. Brown,* 28 N. J. Super. 165, 100 A. 2d 315, 319-320.]

This Court has declared that one who removes to a new State and resides there indefinitely without any *fixed* intention to return to his old home or to move elsewhere acquires a bona fide domicil in the new State, and the fact that he may have doubts about remaining or may in fact later move elsewhere does not have any effect upon his acquisition of such a domicil. [*District of Columbia v. Murphy,* 314 U. S. 441, 444-445, 456.] The most that can conceivably be said for respondent's view of the undisputed evidence here is that, having moved to Nevada with the intention of seeking a divorce, petitioner decided, *one year later,* to move again—not back to Pennsylvania, but to California. The evidence falls far short of furnishing support even for an inference that, when he arrived in Nevada, petitioner did so with the then-fixed and definite intention to move elsewhere at a future date. Nothing less than proof of that quality would meet the evidentiary burden which, this Court has stated, the Constitution places upon respondent. [*Williams v. North Carolina,* 325 U. S. 226, 233-234.] In the case at bar, the court below has purported to recognize that the burden is respondent's, but has in fact shifted that burden to petitioner by its ruling. Notwithstanding a total lack of *any* evidence tending to *disprove* petitioner's claim of Nevada domicil, the court below has ruled that the claim has not been *proved* by petitioner's testimony. For such a ruling, the court relies only upon evidence of petitioner's wholly immaterial motives in the acquisition of such a domicil. That ruling does not discharge, but to the contrary distinctly violates, the duty of respect owed under the full faith and credit clause by Pennsylvania's courts to the judgment of its sister States.

Conclusion.

In the light of the facts here revealed by the record, it would not seem inappropriate to recall the words of caution addressed by this Court to the courts of the several States, in *Williams v. North Carolina,* 325 U. S. 226, 232:

> ". . . to endow each State with controlling authority to nullify the power of a sister State to grant a divorce based upon a finding that one spouse had acquired a domicil within the divorcing State would, in the proper functioning of our Federal system, be equally indefensible. No State court can assume comprehensive attention to the various and potentially conflicting interests that several States may have in the institutional aspects of marriage. The necessary accommodation between the right of one State to safeguard its interest in the family relation of its own people and the power of another State to grant divorces can be left to neither State."

Ultimately, the resolution of this conflict by the State courts within our Constitutional framework necessarily requires the supervisory vigilance of this Court, for only by such supervision can the duty of respect enjoined by the full faith and credit clause be fairly enforced. If each State court is to feel free to disregard the judgments of sister States by casting its actions in the form of "findings of fact" purportedly made with due regard to the controlling principles enunciated by this Court, but actually made without adequate factual support therefor, the constitutional command of full faith and credit will be reduced to nothing more than a precatory suggestion. That is precisely what has occurred here. Unless sanction is to

be given to the use of such a sophisticated device for avoiding the duty of respect which Pennsylvania's courts owe to a judgment of its sister State, certiorari must here be granted and the judgment below reversed.

Respectfully submitted,

THOMAS W. POMEROY, JR.,
Attorney for Petitioner.

HARRY L. GERSHON,
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Of Counsel.

APPENDIX.

In the Supreme Court of Pennsylvania, Western District.

Commonwealth *ex rel.* Marion C. McVay v. Herbert C. McVay, Appellant. No. 186. March Term, 1955

Appeal from the Judgment of the Superior Court of Pennsylvania at No. 257 April Term, 1954, affirming the order of the County Court of Allegheny County at No. C 39 of 1946.

Opinion of the Court.

HORACE STERN, *C. J.*

Filed: November 14, 1955.

In these proceedings to terminate a support order and vacate a judgment for arrears due thereon, the principal question is the faith and credit to be given to a decree of divorce which was obtained in a Nevada court. We allowed an appeal from the decision of the Superior Court on that question reported in 177 Pa. Superior Ct. 623, 112 A. 2d 649.

The parties were married in Pittsburgh in 1926 and resided there continuously until they separated in 1945. In January, 1946, the wife, Marion C. McVay, obtained in the County Court of Allegheny County a support order of $100.00 a month, reduced in July, 1947, to $80.00 a month, against her husband, Herbert C. McVay. In November, 1946, the respondent went to Florida and there, in the following February, instituted proceedings for divorce. In April, 1948, the court dismissed his complaint and at the same time allowed the wife's counterclaim for alimony, awarding her the same sum, $80.00 per month, as had been granted her by the County Court

of Allegheny County. On January 16, 1949, respondent went to Las Vegas, Nevada, and on March 5, 1949, filed there a complaint in divorce. Service was made by publication but the wife did not enter an appearance in the action. On April 18, 1949, the Nevada Court granted respondent an absolute divorce. He then discontinued all payments on the support order; he was not in arrears up to that time. On January 10, 1950, he left Nevada and moved to California where he still resides. On April 14, 1953, the County Court of Allegheny County, on the wife's petition, ordered the arrearages of $2,960. then due on the support order reduced to judgment, of which notice was immediately given to respondent in California. He thereupon obtained a rule to show cause why the judgment should not be vacated and the support order terminated. The court, after hearing, discharged the rule; respondent then appealed to the Superior Court which affirmed the order of the County Court.

If the Federal Constitution requires that the Nevada divorce be recognized in this Commonwealth respondent's obligation to support his wife ceased automatically when the divorce was granted; conversely, if the constitutional mandate of full faith and credit does not compel such recognition the support order continued in force and the judgment for the arrears was properly entered.

A decree of divorce is a conclusive adjudication of everything involved therein except the jurisdictional facts on which it is founded, and domicile, of course, is a jurisdictional fact. The bona fides of the domicile is subject to collateral attack in any other State by the spouse who did not appear in the court where the decree of divorce was granted. The full faith and credit clause of the Constitution requires that *prima facie* validity be accorded

the divorce decree of a sister State, but the presumption of the existence of the jurisdictional prerequisite of domicile is rebuttable, the burden of proof to overcome it resting on the party attacking the decree.

The present question for determination is whether respondent was a bona fide domiciliary of Nevada when he instituted the divorce proceedings in that State. There is no factual dispute over his activities during the period of his residence there; the only issue is in regard to the inferences to be drawn from the facts to which he himself testified. He admitted that his primary reason for moving to Nevada was to obtain a divorce; on the very day of his arrival in Las Vegas he consulted an attorney whom he had previously retained for that purpose, and he started proceedings immediately after the required six weeks' residence. While the motive that impelled him to seek the new domicile is not in any sense conclusive it does constitute an important factor to be taken into consideration in determining whether he really intended to make his home in Nevada. When he came to Las Vegas he took a room in a private dwelling; there he was joined by his former secretary, whom he married five days after his divorce was granted; the wife had claimed in the Florida divorce action that this secretary was the cause of their domestic difficulties. In September the couple moved to an apartment in Las Vegas which he rented on a month to month basis. To show that he intended to establish a permanent domicile in Nevada and not merely a temporary sojourn for the sole purpose of obtaining a divorce, respondent testified that after his marriage and removal to the new apartment he had a telephone listed under his name; that he signed up for light and power with a public utility; that in October he pur-

chased household furniture with which to furnish the apartment (he took his furniture with him three months later on moving to California); that he established a bank account, attended lodge meetings and church services, obtained a driver's license for the purpose of driving the truck of a furniture company where he was employed, and had business cards printed containing the address of the establishment where he was working at the time. But all such activities are of little significance in connection with the question as to whether he was really intending to establish a home in Nevada. He had been a trained accountant and before going to Nevada had been employed in Pittsburgh as a tabulating supervisor with the West Penn Power Company at a monthly salary of $415. In Las Vegas his first employment was as a relief clerk at a hotel where he received $10 a day compensation but worked only on days when a relief man was needed. During that same period he had a job for three days with another concern, then for three months he was employed as an auditor for a hotel company and for three more months as an accountant at a furniture store. At this last job he received a salary of $90. per week; why he did not continue there does not appear in the testimony. He testified that notwithstanding his making extensive inquiries from both public and private sources he was unable to find permanent employment. He decided that the opportunities would be greater in California than in Nevada; therefore he moved to Glendale in that State and has remained a resident of California ever since. It may be noted that he did not try to obtain employment in Nevada outside of Las Vegas nor did he have any job awaiting him in California; in fact he did not secure a job there for a period of five or six months,

and then only at a slightly lower salary than he had been receiving at the furni ure store in Nevada.

From all the facts and circumstances of respondent's residence in Nevada the County Court of Allegheny County concluded that he was not a bona fide domiciliary of that State at the time he instituted his action there in divorce. This was because the superficial indicia of domiciliary intent were apparently outweighed in the total factual picture by the unavoidable inference that, having gone to Nevada for the sole purpose of securing a divorce and marrying his former secretary, respondent undertook to work there at casual and temporary jobs merely while making what he considered sufficient time to give color to his alleged acquisition of a bona fide domicile. While there is no doubt that, in order to accomplish his purpose, he intended to acquire a domicile, the intention required for the acquisition of a domicile is not to acquire the domicile but to make a home in fact: Rest. Conflict of Laws, §19. It must be remembered that respondent sought to acquire a domicile in Florida but, patently, not to make a home there; frustrated in Florida he then sought to acquire a domicile in Nevada, but, again quite obviously, not to make that State his home. In our opinion the conclusion reached by the County Court, fortified as it is by the opinion of the Superior Court, was amply justified and should be affirmed.*

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*In *Commonwealth ex rel. Meth v. Meth*, 156 Pa. Superior Ct. 632, 639, 41 A. 2d 752, 755, 756, Judge Reno said: "Unless the courts are to be reduced to a state of juvenile naivete, they cannot be required to accept self-serving declarations which are wholly at variance with actualities evidenced by the conduct of the party out of whose mouth they came. The burden of proving respondent's state of mind while he was in Nevada was on relatrix, but when her proofs of what he did demonstrate so forcibly what his intentions were, she will not be precluded by his patently flimsy protestations to the contrary."

Respondent contends that the decree of permanent alimony entered by the Florida Court was entitled to full faith and credit in the County Court of Allegheny County and superseded the support order of that court. There are two reasons why this contention fails. One of the provisions of the Florida decree was that jurisdiction of the parties was retained until further order of the court. It is stated in Rest. Conflict of Laws, §435: "A valid foreign judgment for the payment of money which by the law of the state in which it was rendered is not a final judicial determination of the right to payment will not be enforced." A judgment which is subject to modification by the court which rendered it is not entitled to recognition: 50 C. J. S. 478, §889(3), and cases cited in footnote 38. Therefore the order for alimony issued by the Florida Court was not such a judgment for a sum certain as could properly be entered and enforced in Pennsylvania, and the wife was not required to seek relief under that order but could proceed under the support order in force in this jurisdiction: Commonwealth *ex rel.* Bucciarelli v. Bucciarelli, 162 Pa. Superior Ct. 582, 60 A. 2d 554. The other reason is that there is no conflict between a support order and a decree awarding alimony, and both such orders may run concurrently unless and until a divorce is granted: Heilbron v. Heilbron, 158 Pa. 297, 27 A. 967; Commonwealth v. McMaster, 88 Pa. Superior Ct. 37. The Florida Court awarded the wife $80 per month apparently because that was the amount which she had been obtaining under the Pennsylvania support order and it was neither intended nor used as a duplication.

A final contention of respondent is that the judgment for the arrearages due on the support order was entered

without notice to him in California, he having been informed of it only afterwards by registered letter from the court. The court had obtained jurisdiction over the parties and the proceedings had been pending for several years, and the entry of this judgment represented merely a calculation of the amount of the arrearages due under the support order since the date of the Nevada divorce decree. Respondent was fully aware that the support order was in force and that no payments were made by him after the entry of that decree; he must have known, therefore, that a judgment could be entered against him at any time for such arrears. It is true that the Act of June 19, 1939, P. L. 440, provided that any order for the support of a wife may be altered, repealed, suspended, increased or amended, and the court may, at any time, remit, correct or reduce the amount of any arrearages as the case may warrant; therefore, had the facts warranted, respondent might have presented evidence to establish that the alleged arrearages or some part thereof were not due because of the death or remarriage of the wife, or that the obligation had been discharged by payment or otherwise, or that circumstances had so changed as to justify a reduction of the arrearages already accrued. But whatever defenses might thus have been presented, they are all equally available to respondent in the present proceedings and therefore he has not been in the least prejudiced by the failure to have received advance notice of the entry of the judgment. He has paid nothing on the judgment. His present petition is based solely upon the contention that by reason of his Nevada divorce his obligation to support his wife automatically ceased and that therefore the judgment entered for arrearages accruing after that date should be vacated; in view of what has

heretofore been said, he is not entitled to such relief. The case of Griffin v. Griffin, 327 U. S. 220, upon which respondent relies, is clearly distinguishable. The question there involved was whether a judgment for arrears of alimony under a decree entered in New York without preliminary notice to the respondent was entitled to full faith and credit in proceedings to enforce the judgment in the District of Columbia. It was there argued that the judgment did not deprive the respondent of any defenses which he might have been entitled to make and that he could still proceed to establish such defenses, but the court held that the judgment could not be made the basis of suit in another jurisdiction subject to defenses which might be grounds for setting it aside in New York; in other words, that the court in the District of Columbia could not open or vacate the judgment on the basis of any potential defense which might have been asserted in the State of New York. No such problem exists in the present case since we are not dealing here with any proceedings in California to enforce the Pennsylvania judgment but only with proceedings in Pennsylvania itself to determine the validity of the judgment in this Commonwealth where it was entered and where respondent now presents all the reasons for which he seeks to vacate the judgment and terminate the order of support.

The order or judgment of the Superior Court is affirmed at appellant's costs.

MAR 12 1956

IN THE SUPREME COURT OF THE UNITED STATES

HERBERT C. McVAY,
Petitioner

VS.

COMMONWEALTH OF PENNSYLVANIA
ex rel. MARION C. McVAY,
Respondent

No. 670 October Term, 1955

BRIEF OF RELATRIX IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Earl Warren, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Relatrix, Marion C. McVay, respectfully urges your Honorable Court to refuse petitioner's request for a writ of certiorari.

COUNTER STATEMENT OF QUESTION PRESENTED

Did the Supreme Court of Pennsylvania commit error in finding that Petitioner's conduct and statements were such as to show that he did not acquire domicile in the State of Nevada and that therefore the decree of divorce granted him in Nevada is not within the Full Faith and Credit Clause of the United States Constitution?

COUNTER STATEMENT OF THE CASE

1. Petitioner and relatrix were married on June 1, 1926, and lived together until October 14, 1943. Subsequently, the County Court of Allegheny County, Pennsylvania, entered an order for relatrix's support.

2. On November 3, 1943 petitioner arrived in Florida and filed a divorce action on February 1, 1947. Relatrix entered

Office - Supreme Court, U. S.

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